MOTION FILED
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No. 07-1559

In the Supreme Court of the United States

M.M., by and through her
parent and natural guardian, L.R.,
Petitioner,

v.

Special School District No. 1, Minneapolis,
Minnesota and Minneapolis Board of Education,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF MINNESOTA DISABILITY LAW CENTER (MDLC) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 37.3(b) of the Rules of the Supreme Court of the United States, the Minnesota Disability Law Center (MDLC) hereby requests leave to file the accompanying *amicus curiae* brief. This brief is submitted in support of the Petition for Writ of Certiorari to the Court of Appeals for the Federal Circuit. Petitioner M.M., by and through her parent and natural guardian, L.R., has consented to the filing of this brief. Respondent Special School District No. 1, Minneapolis, Minnesota and Minneapolis Board of Education, has not consented.

The Minnesota Disability Law Center moves the Court to grant leave to file an *amicus curiae* brief in support of Petitioner's Writ of Certiorari regarding the burden of proof issue.

ARGUMENT

I. MDLC HAS A COMPELLING INTEREST IN THE ISSUE AND OUTCOME

The Minnesota Disability Law Center (MDLC) is a project of the Legal Aid Society of Minneapolis (LASM). With a 95-year history of high-quality

representation, LASM is designated by the Governor of Minnesota pursuant to federal statutes to serve as the Protection and Advocacy System for persons with disabilities in Minnesota. LASM performs this function through the MDLC.

MDLC works to advance the dignity, self-determination and equality of individuals with disabilities through direct legal representation, advocacy, education and policy analysis. As part of its Protection and Advocacy work, MDLC advocates for the rights of children with identified disabilities to receive special education services pursuant to federal and state law. MDLC provides comprehensive representation for these children, including individual and policy advocacy on special education issues.

MDLC has a compelling interest in the outcome of this matter in two regards. First, MDLC's work for children with disabilities would be significantly compromised if Minnesota statutory and regulatory law, including the burden of proof statute, is not given due weight by the Court. Minnesota special education law has unique requirements different from the underlying federal special education law; these Minnesota-specific provisions, including the statutory allocation of the burden of proof, are of

critical importance to the children with disabilities that MDLC represents.

Second, the allocation of the burden of proof to school districts is an important tool in MDLC's individual and policy work on behalf of children with disabilities. Specifically, this allocation serves to benefit the legal position of children with disabilities because it serves to address unequal information and positional balances between school districts and parents of children with disabilities.

II. MDLC's *AMICUS* BRIEF WOULD ASSIST THE COURT IN ITS DETERMINATION

MDLC's *amicus* brief would assist the Court in two specific areas. First, MDLC will review Minnesota's clear legislative intent on the allocation of the burden of proof, in most circumstances, to school districts. This legislative intent will show that Minnesota has clearly and carefully chosen to develop laws that are different from the federal special education law and that this choice should be recognized by the Court.

Second, MDLC's *amicus* brief will analyze court decisions regarding the burden of proof in jurisdictions where other states have laws or regulations that have allocated the burden of proof, in

most circumstances, to school districts. The review of other jurisdictions will demonstrate how other courts and administrative decisions have addressed state pronouncements on the allocation of the burden of proof school districts so as to effectuate the state's legitimate policy goals.

CONCLUSION

The Minnesota Disability Law Center respectfully requests that the Court grant it leave to file an *amicus curiae* brief.

Respectfully submitted,

MINNESOTA DISABILITY LAW CENTER

Dated: 7/10/08

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I. INTRODUCTION

We request that the United States Supreme Court reverse the burden of proof decision of *M.M. ex rel. L.R. v. Special Sch. Dist., No. 1*, 2008 WL 53265 (8th Cir. 2008). The *M.M.* decision allocated the burden of proof to the moving party despite a valid Minnesota law allocating the burden of proof to school districts in most instances. The *M.M.* decision is based on *Sch. Bd. of I.S.D. No. 11 v. Renollett*, 440 F.3d 1007 (8th Cir. 2006). In *Renollett*, the parties did not present to the Eighth Circuit panel any disputed issue related to the school district's burden of proof. Nevertheless, without the benefit of briefing or argument from either party, the *Renollett* panel *sua sponte* stated a legal conclusion in footnote 3 concerning the school district's burden of proof. In doing so, the *Renollett* panel failed to analyze state law and improperly extended the limited decision of *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528 (2005). The *M.M.* decision compounds *Renollett's* error.

In both *M.M.* and *Renollett*, the Eighth Circuit Court of Appeals substituted its own view of the allocation of burden of proof for valid pronouncements of state policy, without adequate analysis and based on a mistaken reading of the *Schaffer* decision. We urge the Court to correct these decisions and provide a

* No counsel to the parties to this matter authored any part of this brief, and no counsel to the parties to this matter made a monetary contribution intended to fund the preparation or submission of this brief *amicus curiae*.

clear analysis and statement of law consistent with the goals of the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400-1482 (2004) and the better reasoning of other federal courts that have considered the issue.

II. ARGUMENT

A. The Panel Opinion In *M.M.* Compounds *Renollett's* Error By Failing To Conduct A Thorough And Thoughtful Analysis Of Minnesota State Law And Policy Regarding Allocation Of The Burden Of Proof

While *M.M.* expressly acknowledged that *Schaffer* declined to extend its holding to states like Minnesota where state law allocated the burden, it applied *Renollett* as an authoritative designation of the burden of proof. *M.M.*, 2008 WL 53265 at *1. *M.M.* compounds the error of *Renollett*, which failed to analyze the relevance and impact of Minn. Stat. § 125A.091, subdiv. 16 (2007).[1]

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[1] We note that in deciding *Renollett*, the Eighth Circuit Court of Appeals did not have the benefit of any briefing or argument concerning the issue of the allocation of the burden of proof. "Sound judicial decisionmaking requires 'both a vigorous prosecution and a vigorous defense' of the issues in dispute,"

Where a state rule or statute allocates the burden of proof to school districts and where courts have thoughtfully considered and explained[2] the allocation, resulting decisions defer to and apply the state rule

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Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217 (1993) (J. Scalia, concurring), citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419, 98 S. Ct. 694, 699, 54 L. Ed. 2d 648 (1978). Indeed, since both parties in *Renollett* agreed that the burden of proof had been properly allocated to the school district, the issue was not addressed in the briefs or arguments presented to the Court of Appeals and, as such, was not a matter for an appeal. Instead, the burden of proof issue was raised *sua sponte* by that court even though, ultimately, this issue was not determinative of the outcome. As such, *M.M.* elevates dictum on a non-determinative issue, that was not briefed by either party or subjected to a thorough analysis of the applicability of Minnesota statutes following *Schaffer*, to a broad and significant holding.

[2] *Schaffer* noted the following jurisdictions as allocating the burden of proof to school districts by statute or rule: Alabama; Alaska; Connecticut; Washington, D.C.; Delaware; Georgia; Illinois; Kentucky; Minnesota; and West Virginia. *Schaffer*, 546 U.S. 49, 61 (2005). An Illinois federal court decision indicates, however, that the Illinois law only refers to the production of evidence and not to the burden of proof. *Kerry M. v. Manhattan Sch. Dist. # 114, No. 03 C 9349*, 2006 WL 2862118 (N.D. Ill. 2006).

or statute.[3] Further, in decisions where both the state rule or statute and *Schaffer* were examined, the courts applied the state allocation of the burden of proof, whether it ultimately fell on parents or schools. In no case where the state law was thoroughly considered was the state law determined to be inapplicable and *Schaffer* applied in its stead. By conducting a thorough analysis of when state laws are entitled to deference, the Court will ensure consistency in future decisions as well as give proper deference to valid legislative pronouncements of state policy.

A persuasive and careful statement of judicial reasoning concerning the applicability of a state statute after *Schaffer* was decided is found in *P. ex rel. Mr. P. v. Newington Bd. of Educ.*, 512 F. Supp. 2d. 89, 99 (D. Conn. 2007). The court stated:

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[3] We acknowledge the following circuit courts have allocated the burden of proof in accordance with *Schaffer*: *Board of Educ. of Twp. High Sch. Dist. No. 211 v. Ross*, 486 F.3d 267 (7th Cir. 2007); *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9th Cir. 2007); *M.M. ex rel. C.M. v. Sch. Bd. of Miami-Dade County, Fla.*, 437 F.3d 1085 (11th Cir. 2006); *Nack ex rel. Nack v. Orange City Sch. Dist.*, 454 F.3d 604 (6th Cir. 2006); *L.E. v. Ramsey Bd. of Educ.* 435 F.3d 384 (3rd Cir. 2006); *Sherman v. Mamaroneck Union Free Sch. Dist.*; 340 F.3d 87 (2nd Cir. 2003). However, none of the courts of appeal have ruled on a case where the state statute provided for a contrary allocation.

Although the IDEA is silent with regard to which party bears the burden of proof in an administrative hearing challenging a child's IEP, the Supreme Court has recently clarified that it is properly placed upon the party seeking relief. *Schaffer v. Weast,* 546 U.S. 49, 62, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005). However, several states have decided to override the default rule and place the burden upon the school district in all cases by regulation. *Id.* at 61-62, 126 S. Ct. 528. The Supreme Court declined to decide the issue of whether states can legitimately enact such regulations. *Id.* Therefore, in this case, the burden of proof during the administrative hearing was properly placed upon the school district in accordance with Connecticut Department of Education regulations. These regulations state that "the public agency has the burden of proving the appropriateness of the child's program or placement, or of the program or placement proposed by the public agency," which "shall be met by a

> preponderance of the evidence." Conn. Reg. § 10-76h-14(a).

P. 512 F. Supp. 2d at 99.

The Minnesota statute allocating the burden of proof was in effect at the same time as the Connecticut regulation noted above, and we suggest that the Court accept the *P.* Court's reasoning as persuasive and directly pertinent to resolving the instant issue.

This suggestion is consistent with several other federal courts that thoroughly analyzed state law and determined that the relevant state allocation of the burden of proof governs the case, even after *Schaffer*. *See, Brennan v. Reg'l Sch. Dist. No. Bd. of Educ.*, 2008 WL 220751, *17 (D. Conn. 2008); *Roark ex rel. Roark v. District of Columbia*, 460 F. Supp. 2d 32, 39 (D.D.C. 2006);[4] *W.C. ex rel. Sue C. v. Cobb County Sch. Dist.*, 407 F. Supp. 2d 1351 (N.D. Ga. 2005); *Escambia County Bd. of Educ. v. Benton*, 406 F. Supp. 2d 1248 (S.D. Ala. 2005).

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[4] Other district court cases only apply Washington D.C. law and do not address *Schaffer* as follows: *T.S. ex rel. Skrine v. District of Columbia*, slip op., 2007 WL 915227 (D.D.C. 2007); *Anthony v. District of Columbia*, 463 F. Supp. 2d 37 (D.D.C. 2006); *Green v. District of Columbia*, Civil Action No. 05-550 (CCK), 2006 WL 1193866 (D.D.C. 2006).

Only when courts did not examine state law and simply relied on *Schaffer* did they apply the burden of proof to the moving party. *See, E.K. ex rel. Mr. K. v. Stamford Bd. of Educ.*, slip op., 2007 WL 1746201 (D. Conn. 2007); *A.S. v. Trumbull Bd. of Educ.*, 414 F. Supp. 2d 152 (D. Conn. 2006); *J.K. v. Fayette County Bd. of Educ.*, No. Civ. A. 04-158-JBC, 2006 WL 224053 (E.D. Ky. 2006); *K.C. v. Fulton County Sch. Dist.*, slip op., 2006 WL 1868348 (N.D. Ga. 2006). As in *Renollett*, these courts applied *Schaffer* without examining whether state law allocated the burden. By failing to consider state law and policy, the courts undermine the cooperative federalism structure of the IDEA. *Schaffer*, 546 U.S. at 52-53.[5]

Accordingly, the Minnesota Disability Law Center (MDLC) encourages the Court to address the oversight in *M.M.* and *Renollett* and apply Minnesota statutes. The United States Supreme Court has the opportunity to ensure that federal court decisions will

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[5] There is a split in the Connecticut and Georgia District Court decisions. However, the distinction is whether those courts analyzed and applied state law.

correctly and consistently apply state laws when the burden of proof is at issue in special education cases.[6]

B. Minnesota Statutes Section 125A.091, Subdivision 16, With Its Clear Legislative Intent, Is Entitled To Deference

The Minnesota Legislature reached its decision on the allocation of the burden of proof in 2003 with its enactment of Minn. Stat. § 125A.091 (2007). This Minnesota Statute has not been repealed by the Minnesota Legislature and it was not expressly overturned by the *Schaffer* decision or any other court decision. Further, Congress has not revised the IDEA to provide a contrary regulation. Accordingly, Minnesota's legislative decision on the burden of proof in special education hearing is entitled to deference.

The detailed consideration of Minnesota-specific policy determinations that we suggest is clearly contemplated by United States Supreme Court precedent and by the terms of the federal IDEA itself.

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[6] We note that an unpublished Minnesota federal district court case, *I.S.D. No. 701, Hibbing Pub. Schools v. J.T.*, 2006 WL 5176 48, * 6 n.6 (D. Minn. 2006), allocated the burden of proof to the school.

The IDEA consists of "skeletal federal provisions designed as minimum standards" for the education of children with disabilities. *Town of Burlington v. Dep't of Educ. Comm. of Mass*, 736 F.2d 773, 785 (1st Cir. 1984), *aff'd sub nom.*, 471 U.S. 359 (1985). States are expected to fill in the details of special education law. *Id.* 736 F.2d at 785.

As *Schaffer* acknowledges, the IDEA specifically allows, and in some instances requires, states affirmatively to develop special education policies and procedures to ensure cooperation and reporting between state and federal educational authorities:

> Participating states must certify to the Secretary of Education that they have "policies and procedures" that will effectively meet the Act's conditions. 20 U.S.C. § 1412(a). ... State educational agencies, in turn, must ensure that local schools and teachers are meeting the State's educational standards. 20 U.S.C. §§ 1412(a)(11), 1412(a)(15)(A). Local educational agencies (school boards or other administrative bodies) can receive IDEA funds only if they certify to a state educational agency that they are acting

> in accordance with the State's policies and procedures. § 1413(a)(1).

Schaffer, 546 U.S. 49, 52-53.

Congress intended to leave certain regulations to the states. The allocation of the burden of proof is one such matter, and Minnesota has clearly determined its policy through careful deliberations and legislative action. Accordingly, this Court should defer to state policy decisions as contemplated by the IDEA.

In enacting Minn. Stat. § 125A.091, the Minnesota Legislature followed existing Minnesota special education rules and hearing decisions that allocated the burden of proof to schools. From at least 1981 until *M.M.*, Minnesota due process hearing officers have consistently followed state law allocating the burden of proof in their decisions. *See, e.g., In re: Indep. Sch. Dist. No. 77, 503* IDELR 144 (1981); *Indep. Sch. Dist. No. 720,* 106 LRP 34233 (2006).

Given the careful consideration of policy issues by highly qualified stakeholders that informed the Minnesota Legislature's choice of burden of proof, the Court should regard Minn. Stat. § 125A.091 as a valid pronouncement of state policy. We note that the New Jersey and New York state legislatures

recently enacted legislation allocating the burden of proof.[7] Because Minn. Stat. § 125A.091 was not overruled by *Schaffer*, it remains a valid pronouncement of state law and policy.

MDLC, in its role as *amicus*, is greatly concerned that if this Minnesota statute is overruled, other valid pronouncements of state policy would also be improperly called into question. In order to ensure consistency within the Circuit Courts and within Minnesota's state hearing system, we urge the Court to recognize and enforce the clear and unambiguous state pronouncement on allocation of burden of proof by reversing *M.M.*

Respectfully submitted,

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Dated: 7/11/08

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[7] *See*, N.J.S.A. 18A:46-1.1 (2008) and N.Y. Educ. Law § 4404 (McKinney 2007).